

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

“Amy” and “Vicky”,

Plaintiffs,

v.

Joshua Osmun Kennedy,

Defendant.

CONSOLIDATED

LEAD CASE NO. C13-17 RAJ

MEMBER CASE NO. C13-762 RAJ

DECLARATION OF JENNIFER FREEMAN

NOTE ON MOTION CALENDAR:

July 25, 2014

WITHOUT ORAL ARGUMENT

Jennifer Freeman hereby declares the following to be true and correct under penalty of perjury:

Declaration of Jennifer Freeman
In Support of Plaintiff's Motion to Compel - 1

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1 1. My firm, Freeman Lewis LLP, is co-counsel to Plaintiff “Amy” in this action
2 (“Amy” or Plaintiff”) along with the Marsha Law Firm and the Law Office of Jo-Hanna Read. I
3 am an attorney admitted to practice in the State of New York and a partner in Freeman Lewis
4 LLP, and I am admitted *pro hac vice* in this case. I submit this Declaration in support of Amy’s
5 motion to compel discovery and a privilege log from Defendant Kennedy and his criminal
6 defense lawyers Suzanne Elliott and Gilbert Levy.

7 2. The underlying action seeks civil damages under 18 U.S.C. §§ 2252A and 2255
8 against defendant Kennedy for his criminal possession and transportation of images of plaintiff
9 Amy (as well as Plaintiff Vicky) being sexually abused as children.

10 3. Defendant was tried and convicted of child pornography offenses in this Court.
11 That conviction was affirmed by the Ninth Circuit.

12 4. On May 22, 2013, pursuant to Rule 26, Defendant produced documents,
13 consisting of ten discs which he said represented those documents produced to Defendant by the
14 government in the criminal case. However, one of those discs was blank and several of the files
15 were encrypted. Despite repeated requests by Plaintiff, Defendant has not produced the tenth
16 disc with content or explained why the disc is blank. Nor has he provided the encryption
17 password or explained why it cannot be provided.

18 5. On January 3, 2014, Amy served her First Request for Production of Documents
19 (Exhibit 1) and First Set of Interrogatories (Exhibit 2).

20 6. On February 19, 2014, Defendant served objections, but did not produce any
21 documents or answer any interrogatories. (Exhibits 3 and 4).

Declaration of Jennifer Freeman
In Support of Plaintiff’s Motion to Compel - 2

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7. In early May 2014, in an effort to obtain at least some of the documents which Defendant Kennedy had not produced, Plaintiff served *subpoenae duces tecum* on Defendant's criminal defense counsel, Suzanne Elliott and Gilbert Levy respectively. (Exhibits 5 and 6).

8. On May 15, 2014, Ms. Elliott served a general objection to the subpoena and a Memorandum in support of objection to subpoena, but produced no documents. (Exhibit 7).

9. On May 16, 2014, Mr. Levy served general objections to the subpoena, but produced no documents. (Exhibit 8).

10. On June 2, 2014, my partner Robert Y. Lewis and I sent a letter to defenses counsel for Kennedy in both the civil and criminal cases, pointing out deficiencies in their objections, and seeking production of documents, answers to interrogatories, and privilege logs. (Exhibit 9).

11. On June 9, 2014, counsel for Plaintiff Amy and Plaintiff Vicky, Kenneth Hart (representing Defendant Kennedy in the civil case), Ms. Elliott, and Mr. Levy participated in a Rule 27 "meet and confer" Teleconference. We were able to resolve some, but not all disputes.

12. In the Teleconference, Plaintiffs' counsel discussed with Mr. Hart each request for production and interrogatory and Defendant's objections. At the end of the Teleconference, Mr. Hart said that he would produce additional responses and some documents by June 20.

13. In the Teleconference, Ms. Elliot said that applicable ethical rules prohibit her from producing any responsive documents, and she would not do so without court order. Since that time, counsel have communicated by email about her objections, but have not resolved the dispute.

14. In the Teleconference, Mr. Levy said that he would produce trial exhibits,

Declaration of Jennifer Freeman
In Support of Plaintiff's Motion to Compel - 3

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1 including those marked but not introduced (one of the categories of documents sought in that
2 subpoena), if he had them. Despite subsequent requests to Mr. Levy as to whether he had the
3 exhibits and would produce them, as of 1:30 p.m. this afternoon (Pacific time), Mr. Levy has not
4 yet told us whether he possesses the exhibits or will produce them.

5 15. I am advised that, on or about June 12, 2014 and perhaps on other occasions,
6 counsel for Plaintiff Vicky communicated with AUSA Kate Crisham to attempt to obtain at least
7 some of the discovery information that opposing counsel had not provided. Ms. Crisham said
8 that she was not in a position to assist at that time and would seek to obtain further instruction
9 from applicable officials. She also noted that she didn't understand why Defendant was not able
10 to stipulate regarding any needed facts.

11 16. On June 20, 2014, Defendant served additional responses to Plaintiff's Requests
12 for Production and Interrogatories and produced some documents. (Exhibits 10 and 11). The
13 additional responses and documents resolved some, but not all of the disputes. Defendant also
14 served additional written Rule 26 Initial Disclosures.

15 17. As more fully detailed in Plaintiff Amy's accompanying motion to compel,
16 Defendant has failed, without explanation, to produce disc # 10 with contents or encryption code
17 for several files on the other nine discs produced, failed to produce or direct defense counsel to
18 produce basic documents relevant to this matter such as trial exhibits, claimed attorney-client and
19 work-product privilege without providing a privilege log, refused to provide information
20 regarding his counterclaim, and otherwise failed to comply with discovery requests.

21 18. On June 27, 2014, Plaintiff Vicky took Defendant's deposition; Amy also asked
22 questions. Plaintiff Vicky inquired after some of the same or related information that was sought

Declaration of Jennifer Freeman
In Support of Plaintiff's Motion to Compel - 4

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1 by Amy's discovery requests. Defendant refused to answer many questions on 5th Amendment
2 grounds and based on assertion of his desire to protect his "privacy". For example, Defendant
3 refused to say whether or not he believed he had injured Plaintiffs, refused to identify
4 information relevant to his counterclaim against Amy (such as where he had lived), and refused
5 to provide asset information. (*See* Letter from Carol Hepburn to Kenneth Hart, Exhibit 12).

6 19. On July 1, 2014, Plaintiff Vicky emailed a letter to Defendant asking, among
7 other things, for Defendant to reconsider his refusals to answer, including his failure to respond
8 to similar topics he ignored in his discovery responses. (Exhibit 12). I understand that Plaintiff
9 Vicky is moving to compel Defendant to provide answers.

10 20. As the prosecutor pointed out in an April 21, 2010 hearing in the criminal case,
11 there is reason to believe Defendant has been trying to dissipate assets since his arrest to shield
12 them from any judgment. In that hearing, the Court found that Kennedy displayed a "lack of
13 candor ... regarding his true financial picture." (Exhibit 13 p. 49 lns. 1-2).

14 21. On July 7, 2014, Mr. Levy emailed Amy's counsel to advise that he had located
15 what appeared to be expert reports furnished by the Government which would not be privileged
16 but he needed to send these documents to Defendant Kennedy's attorneys to see if they object.
17 He also said that he would need a court order to produce expert reports from defense experts.
18 (Exhibit 14).

19 22. Today is the last day for discovery, including the last day on which to move to
20 compel discovery.

21 WHEREFORE, based on the evidence in this Declaration, the exhibits, and the
22 accompanying documents, and for the reasons set forth herein and in the Motion, I believe there

Declaration of Jennifer Freeman
In Support of Plaintiff's Motion to Compel - 5

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1 is more than a sufficient basis for concluding that the discovery responses provided by Defendant
2 and defense counsel Suzanne Elliot and Gilbert Levy are insufficient, and we ask this Court to
3 order compliance with the discovery requests, production of a privilege log, payment of costs
4 and attorneys' fees, and for such other relief as is just and proper.

5
6 Dated: July 7, 2014

7 /s/Jennifer Freeman
8 Jennifer Freeman
9

Declaration of Jennifer Freeman
In Support of Plaintiff's Motion to Compel - 6

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Declaration has been served on counsel of record through the Court's CM/ECF filing system.

Dated: July 7, 2014.

/s/Jennifer Freeman
Jennifer Freeman

Declaration of Jennifer Freeman
In Support of Plaintiff's Motion to Compel - 7

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